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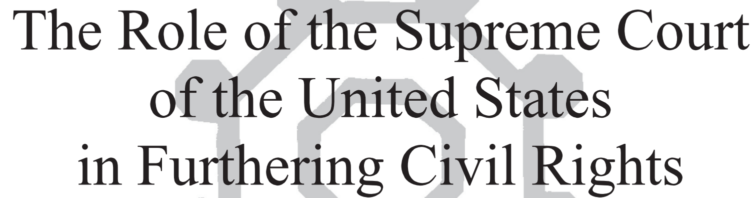
The Role of the Supreme Court of the United States in Furthering Civil Rights



The Greek-style building which hosts the Supreme Court of the United States (hereafter simply the Supreme Court) in Washington bears on its front the words "Equal justice under law". It is significative that the promise to deliver equal justice, in connection to the laws of the United States, is encapsulated in a Ciceronian formula: *aequa iustitia* and *ius* were the foundations of the State for the Roman philosopher and statesman.

The title of this essay is deliberately provocative. The role of the Supreme Court is not political but of judicial review: this means that, among other tasks, it examines the compatibility with the Constitution of federal or state laws, but it does not legislate or have any active political role. In its long history, however, the Supreme Court has had a determinant role in supporting or, conversely, striking down laws which had political implications of the utmost importance. In this essay, I will focus on one specific topic, the support to civil rights, arguing that the Court had a fundamental role in widening them and making them effective. More specifically, I will examine the landmark opinion *Obergefell v. Hodges*, 576 U.S. 644 (2015), which paved the way to marriage between same-sex people, to investigate the legal reasoning behind it and the procedure adopted by the justices involved. I will use this historical point to illustrate a more theoretical point, namely how a judicial body can have a political impact, without having a political agenda, and what is the philosophy behind its working. I will conclude

with some remarks on the exemplary role of the Supreme Court and its influence on legal and political philosophy.

The Supreme Court was established by article III of the Constitution (1789) and met for the first time in 1790. In its original composition it consisted of six members, five associate justices with John Jay, one of the three authors of the *Federalist Papers*, as first chief justice. It grew in prestige under chief justice John Marshall (1801-1835), when it established itself as the ultimate interpreter of the Constitution with the opinion in *Marbury v. Madison*, 5 U.S. 137 (1803). In this ruling, the Supreme Court asserted its authority, and more generally the authority of judges, to review the constitutionality of laws at the federal as well as state level. After establishing its position in the American constitutional arrangement, the Supreme Court issued a number of landmark rulings concerning civil rights. It is to be noted that the Supreme Court judges are nominated by the President and appointed after confirmation by the Senate. This implies that conservative Presidents tend to nominate conservative judges and liberal Presidents progressive judges. However, the filter of Senate's confirmation prevents the appointment of judges who are too opinionated and skewed and might therefore exercise legal activism instead of interpreting and defending the Constitution. In addition, there has always been a remarkable tendency by judges to converge towards the centre of the ideological spectrum of the Court and to feel free from party convictions. This explains the frequent presence of "swing-justices" in the history of the Supreme Court, namely judges who voted according to their judgement on a specific case instead of on the basis of pre-conceived opinions. Briefly, the composition of the Supreme Court does not reflect the sometimes-harsh division according to party lines that one observes in the political history of the United States.

It is to be noted, however, that the final goal of impartiality of the Court cannot ever be completely achieved, a fact that the Framers of the Constitution realistically foresaw. In fact, even when the Supreme Court's opinions are not directly influenced by contemporary politicians, as it happened in the infamous case of *Dred Scott v. Sandford*, when President-elect James Buchanan directly pressured judges, they are influenced by the 'spirit of the age' or, to put it less evocatively, by the historical circumstances. The fact that the personality of the judges and the events of the age would inevitably influence the Supreme Court's rulings was foreseen by the Framers of the Constitution: they posed checks, such as Senate's confirmation, and they established that the position of Supreme Court judge is for life, trying thus to protect the independence of the judges, who need not seek re-election.

The goal of impartiality and the power of historical circumstances

It is perhaps interesting to begin with one of the Supreme Court's lowest points, namely *Dred Scott v. Sandford*, 60 U.S. 393 (1857), in which the Court, hoping to provide a solution to the controversy over slavery, ruled that the rights and privileges of the Constitution did not apply to black people, whether enslaved or free.[1] We know that this fateful opinion written by Chief Justice Roger B. Taney, which is unanimously considered the worst Supreme Court decision by historians, contributed to the financial panic of 1857 and eventually precipitated the civil war. This shows that Supreme Court's rulings profoundly affect the economy and politics of the United States, and their effects are not limited to the legal realm.

Still, the influence of the times in some dire historical circumstances proved to be overwhelming and issued in perplexing, sometimes disgraceful rulings. This appears more evidently in wartime rulings. This is the case for instance of *Schenck v. United States*, 249 U.S. 47 (1919), which appears to have been influenced by the constraints of World War One since it effectively supported the Espionage Act of 1917. The remarkable fact about this unanimous ruling that curtailed freedom of speech is that the opinion was written by the famous progressive judge Oliver Wendell Holmes and it supported a law passed under democratic President Woodrow Wilson. The Court ruled against the defendants, who had invoked their First Amendment right to free speech to support their distribution of anti-draft propaganda and stated that the First Amendment did not protect speech encouraging men to resist induction. The Court also made the more general point that freedom of speech could be limited when it posed "a clear and present danger". Oliver Wendell Holmes was a famously good writer and his perplexing opinion, although somewhat understandable according to the war circumstances, was elegantly drafted and contained this passage, which became a landmark in the Court's rulings:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. [...] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

The same applies to *Korematsu v. United States*, 323 U.S. 14 (1944), another wartime Supreme Court ruling, which upheld the segregation of

Americans of Japanese descent on the West Coast. A discriminatory ruling based on racial considerations, it was overturned explicitly only in an *obiter dictum* by Chief Justice John Roberts, who wrote the opinion of the Court in *Trump v. Hawaii*, 17-965, 585 U.S. (2018): Roberts stated that *Korematsu v. United States* "was gravely wrong the day it was decided, has been overruled in the court of history and -to be clear- 'has no place in law under the Constitution'".[2]

Some landmark decisions concerning civil rights and the idea of tradition

Notwithstanding these incidents, to use an understatement, the Supreme Court has had a decisive role in furthering civil rights throughout its history. I wish to point to some famous cases, examine the ground for the decisions and explore the philosophy behind the judges' opinions. A first landmark case was *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) which effectively ended segregation in schools by affirming that state laws establishing racial segregation in public schools are unconstitutional. This applies also if the segregated schools are equal in quality in all other aspects (curricula, educational qualification of teachers, buildings, transportation): this ruling put therefore an end to the doctrine known as "separate but equal" in public schools. More generally, this ruling is important because the Court, wishing to eschew accusations of judicial activism, thoroughly examined the historical ground for its opinion, based on the Fourteenth Amendment, which affirms that "no state shall deny to any person the equal protection of the laws". The unanimous opinion was written by Chief Justice Earl Warren, freshly appointed by Republican President Dwight Eisenhower, who in the previous months had worked hard to build a consensus around the final opinion. Warren wanted to avoid, if possible, a majority rule which would have provided weapons to segregationists. In the opinion, Warren described the historical development of education, especially in southern states, and emphasized immaterial factors which made segregation unconstitutional, such as its psychological effects on young black people. In the huge literature that *Brown v. Board of Education* produced, I wish to pick two very interesting endorsements, which come from very conservative legal scholars. The first is Justice Clarence Thomas' view about the unnecessary recourse to psychological harm or social science findings in the opinion. Thomas wrote that "Brown I[3] itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the Government cannot

discriminate among its citizens on the basis of race".[4] The other interesting endorsement comes from Robert Bork, a legal scholar who was nominated to the Supreme Court by Ronald Reagan but was not confirmed by the Senate in 1987. An advocate of "originalism" (the view that courts should be guided in their decisions by the Framers' original understanding of the Constitution), Bork wrote that:

> By 1954, when Brown came up for decision, it had been apparent for some time that segregation rarely if ever produced equality. Quite aside from any question of psychology, the physical facilities provided for blacks were not as good as those provided for whites. That had been demonstrated in a long series of cases … The Court's realistic choice, therefore, was either to abandon the quest for equality by allowing segregation or to forbid segregation in order to achieve equality. There was no third choice. Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that. Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation.[5]

I wish now to focus on a series of Supreme Court's opinions that concern the notion of personal autonomy and equal protection, and its consequences on matters of civil rights. More specifically, the issue that interests me concerns the protection of gay people's rights and notably the lawfulness of same-sex marriage. This is a hotly debated and divisive topic which seems to afford a solution only on ideological lines: liberal people are in favour and conservative people are against it.[6] I will try to show that, historically, this is not the case, when one adopts a view of constitutional tradition which adapts the original intention of the Framers of the Constitution to the evolving circumstances. More specifically, I believe that some landmark opinions of the Court disclose the judges' attention to the political and legal tradition of the United States and the intimations of consistency it issues. We will see that, regardless of the political inclinations, some judges reached very liberal conclusions simply following the legal implications of the Constitution and of the legal precedents.

The Framers, and most notably Thomas Jefferson, were imbued with Aristotelian ideas -one needs only think of the notion of "pursuit of happiness" contained in the Declaration of Independence. In arguing the superiority of rule of law over the rule of men as the rule of reason over passion, Aristotle was well aware that human intervention in the laws is

sometimes indispensable: this happens when a new circumstance arises which was not foreseen by the legislator. In this case the judge must decide the case relying on *epieikeia*, equity, fairness: namely, he will try to interpret the existing laws by extending their application to cover the new case. Equity is the legal counterpart of the moral virtue of *phronesis*, practical wisdom, the ability to make the right decision according to the circumstances. This is Aristotle's account of equity, the corrective of legal justice:

> When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission -to say what the legislator himself would have said had he been present, and would have put into his law if he had known.[7]

The problem, Aristotle remarks, is not in the law or in the lawgiver but "in the nature of things" (*NE* V 14, 1137b18). In such a circumstance, the just person (the judge) is superior to the law.[8] The important point is the reasoning that leads to a certain conclusion, which Aristotle saw as the result of a correct perception of the specific requirements of the situation based on the virtue of practical wisdom. Let us examine how this applies to the legal reasoning of the Supreme Court on the topic of gay rights and same-sex marriage.

In the decision *Lawrence v. Texas*, 539 U.S. 558 (2003) the Supreme Court struck down sodomy laws in Texas and, by extension, in the thirteen states which still had such laws. The justices, in a 6-3 decision, affirmed that the right to privacy guaranteed by the Fourteenth Amendment's due process clause included private homosexual activity between consenting adults. They based their decision on the view that the Constitution provides for certain rights although it does not enumerate them, as well as on the notion of personal autonomy.

This opinion overturned the previous ruling of the Court in Bowers v. Hardwick, 478 U.S. 186 (1986): in that case the Court upheld, in a 5-4 decision, the constitutionality of a Georgia sodomy law which criminalized homosexual sex in private between consenting adults. The ground for the Court's ruling was twofold. In the majority opinion, Justice Byron White argued that the Constitution did not confer a fundamental right to engage in homosexual sodomy, thus giving a restrictive interpretation of the Constitution. In his concurring opinion, Chief Justice Warren E. Burger mentioned the millennia-long moral tradition which prohibited homosexual sex, thus appealing to moral and religious considerations. It is noticeable

that in this case the conservative Justice Harry Blackmun dissented arguing that the right to privacy protected sexual activity between consenting adults, even of same sex. He argued that, since Eisenstadt v. Baird, 405 U.S. 438 (1972) had established that the Constitution protects people as individuals and not as family units,[9] no consideration of marital status or sexual orientation should be involved, and the rights of homosexuals should not be treated differently. Blackmun also stigmatized the invocation of religious and moral views in a Supreme Court opinion and the imposition of such views on the entire citizenry. This is even more remarkable considering that Justice Blackmun had been appointed by President Richard Nixon, although he had already clearly shown his conviction that the right to privacy could be extended to include such rights as the use of contraceptives by unmarried couples -in Eisenstadt v. Baird – and even a pregnant woman's right to seek abortion without excessive state or federal restrictions in Roe v. Wade, 410 U.S. 113 (1973) – where he famously wrote the Court's opinion in what is probably the most divisive ruling of the Supreme Court.[10]

These decisions paved the way to the Court ruling in *Obergefell v. Hodges*, 576 U.S. 644 (2015), which declared the unconstitutionality of denying marriage licenses to same-sex couples, thus making same-sex marriage legal in all the United States. The 5-4 majority opinion, written by Justice Anthony Kennedy (nominated by Ronald Reagan), quoted explicitly the precedent *Griswold v. Connecticut*, 381 U.S. 479 (1965): in that opinion, the Court ruled that certain fundamental guarantees protected by the Bill of Rights extended to the right to marital privacy. Appealing to the notion of the sanctity of marriage in American culture as well as to previous Court's rulings, namely to the American legal and political tradition, the Court thus established that certain rights are intimated in that tradition even if they are not enumerated in the Constitution. The author of the 7-2 majority opinion, Justice William O. Douglas, had to use an evocative language to express the concept:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U. S. 497, 367 U. S. 516-522 (dissenting opinion). Various guarantees create zones of privacy. […] We have had many controversies over these penumbral rights of "privacy and repose." See, e.g., *Breard v. Alexandria*, 341 U. S. 622, 341 U. S. 626, 341 U. S. 644; *Public Utilities Comm'n v. Pollak*, 343 U. S. 451; *Monroe v. Pape*, 365 U. S. 167; *Lanza v. New York*, 370 U. S. 139; *Frank v. Maryland*, 359 U. S. 360; *Skinner v. Oklahoma*, 316 U. S. 535, 316 U. S. 541. These cases

> bear witness that the right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.[11]

In *Obergefell v. Hodges* Justice Kennedy built on that ruling and on *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down as unconstitutional all state laws which prohibited interracial marriages on grounds of discrimination. He began the opinion of the Court with these words:

> The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.[12]

He wrote that:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[13]

The way Justice Kennedy phrased the opinion reveals that the Court found in the American legal and political tradition an intimation to resolve the inconsistency between the liberty promised by the Constitution, the equal protection clause and the negation of marriage licences to same-sex couples. Kennedy wrote that:

> Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U. S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g., Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U. S. 479, 484–486 (1965). The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires

> courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See ibid. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements.[14]

The fundamental source of guidance in this process of identification of inconsistencies, of negation of rights, is described thus:

> History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.[15]

Justice Kennedy concluded the opinion by saying that the petitioners "ask for equal dignity in the eyes of the law. The Constitution grants them that right".[16] It is the legal tradition of the United States, the guarantee of equality and equal protection under the law, that compels the judges to put an end to the discrimination and assuage the inconsistency between tradition and current circumstances.

Perhaps the best recognition that the process of identification of inconsistencies in a tradition is necessarily guided by "the Lesbian canon", a flexible and not an objective standard, are the words of Justice Antonin Scalia in his dissenting opinion in *Obergefell v. Hodges*, written to "call attention to this Court's threat to American democracy".[17] A very sophisticated legal mind, Scalia focussed on the unrepresentative nature of the Supreme Court itself and on its related inability and lack of authority to interpret the legal and political tradition of the United States. Scalia deplored the opinion saying that: "The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis";[18] and in a footnote added that "The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie".[19]

Conclusion on a philosophical note

I wish to make two conclusive remarks, expanding on the philosophical aspects of the role and functioning of the Supreme Court. The first concerns the exemplary role of the Supreme Court. When Alexander Hamilton, John Jay and James Madison, the authors of the *The Federalist* (1788), argued for the necessity of a body which could exercise judicial review over federal

and state court cases, they described it as "the citadel of the public justice and the public security".[20] In the 230 years of its existence the Supreme Court proved to be in fact such a citadel and, in addition, it had an exemplary role: that of the supreme umpire, the guarantor of fairness, in procedure and substance, in the legal and political process.

The functioning and exemplary role of the Supreme Court was one of the sources of inspiration for the Oxford philosopher Stuart Hampshire in proposing his procedural notion of justice. In his last works Hampshire argued that justice is the product of conflict as well as the means to prevent conflict from escalating to violence and war. He proposed a procedural view of justice based on history, namely on the way human beings have always dealt with conflict both at the individual and at the societal level. Hampshire argued that in the first document of Western civilization, Homer's *Iliad*, we find that conflict is managed by a council of war, which listens to the opposing arguments; likewise, the single individual who wishes to act in a prudent way evaluates in their mind the different, conflicting courses of action. "The canons of rationality -he maintained- are here the canons of fairness".[21] Hampshire added that this procedural notion of justice could be universally acceptable because it does not involve any substantial vision of the good, which is necessarily subjective and divisive. For him, this is the basic concept of justice, which prescribes the "careful and unbiassed weighing of arguments on both sides".[22] Hampshire considered the notion of procedural justice the basic level of morality because, without it, it is not possible to elaborate a vision of the good life and of the accompanying virtues. In *Justice is Conflict* Hampshire reasserted that "fairness in procedure is an invariable value, a constant in human nature".[23] Fairness is guided by the principle *audi alteram partem*, "hear the other side", which defines the principle of adversary argument. Hampshire argued that

> the Supreme Court has been both the setting and the mechanism of the conflict resolution. The Court and its procedures have in fact acquired authority and have established a tradition of respect among bitter adversaries contesting substantive issues of justice.[24]

The fact that the Supreme Court justices work exactly along the lines described by Hampshire in his model of procedural justice is confirmed by the words of Justice Kennedy. In an interview, Kennedy revealed that in the landmark decision *Obergefell v. Hodges* he wrote opinions arguing for either side; after examining them, he found the one in favour of the plaintiff more persuasive and correct and he adopted it. The 'silent dialogue' in the

mind of the prudent person described by Hampshire was in fact enacted by Justice Kennedy.

The second point I wish to make concerns the notion of 'tradition' involved in the application of previous cases and in the reference to the Constitution that we find in the opinions of the Court. I have already pointed out the remarkable fact that many progressive opinions were written, or concurred, by conservative justices. These conservative judges adopted a notion of tradition as "flow of sympathy" which enables us to look at past statements, such as the articles of the Constitution or previous cases, and identify the implicit intimations for the current circumstances. This is the view of practical activity as "the pursuit of intimations" of a political tradition put forth by the English philosopher Michael Oakeshott. Oakeshott emphasized that conservatism is not grounded on eternal ideas or values but rather on a tradition of political behaviour, which is a living thing requiring us to assuage the inconsistencies that arise within it.[25] For instance, granting full franchise to women was a consequence of the new vision of woman which emerged after World War One (where women proved to be indispensable to the war effort and equal to men). Likewise, *Obergefell v. Hodges* is situated in the American legal and constitutional tradition and consistently expands the notion of dignity and personal autonomy, as well as of right to privacy, contained in the Fourteenth Amendment. When it was adopted in 1868, nobody could foresee the implications it could have when consistently applied to completely different historical circumstances.

NOTES

[1] In its 7-2 decision, the majority opinion written by Chief Justice Taney states that black people "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States".

[2] *Trump v. Hawaii*, 17-965, 585 U.S. (2018): 38.

[3] The Supreme Court re-examined the topic of *Brown v. Board of Educatio*n in a second opinion which addressed the issue of desegregation in schools: *Brown v. Board of Education*, 349 U.S. 294 (1955). This second opinion became known as Brown II, and the former Brown I.

[4] Clarence Thomas' concurring opinion in *Missouri v. Jenkins*, 515 U.S. 70 (1995).

[5] R. Bork, *The Tempting of America* (New York: The Free Press, 1990): 82.

[6] There are some excellent works on this topic. See, for instance, S. Macedo, *Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage* (Princeton: Princeton University Press, 2015) who argues from an Aristotelian perspective of human flourishing. In Italian see M. Viggiani, *Il liberalismo politico e il matrimonio tra persone dello stesso sesso*, Milan: Ledizioni, 2018) for an accurate introduction to the topic; and G. Zanetti, *L'orientamento sessuale. Cinque domande tra diritto e filosofia* (Bologna: il Mulino, 2015) for the philosophical-political implications.

[7] Aristotle, *Nicomachean Ethics* V 14, 1137b19-24.

[8] See the interesting observations of C. Horn, "Epieikeia, the Competence of the Perfectly Just Person in Aristotle" in B. Reis (ed), *The Virtuous Life in Greek Ethics* (Cambridge: Cambridge University Press, 2006): 142-166.

[9] Writing the opinion for the Court, Justice William J. Brennan stated that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

[10] For an introduction to this landmark case see N.E.H. Hull, *The Abortion Rights Controversy in America. A Legal Reader* (Chapel Hill: University of North Carolina Press, 2004).

[11] *Griswold v. Connecticut*, 381 U.S. 479 (1965): 484-5.

[12] *Obergefell v. Hodges*, 576 U.S. 644 (2015): 1-2.

[13] Ibidem: 11.

[14] Ibidem: 10.

[15] Ibidem: 10-11.

[16] Ibidem: 28.

[17] *Obergefell v. Hodges*, 576 U.S. 644 (2015), Scalia J. dissenting: 1.

[18] Ibidem: 9.

[19] Ibidem: 8 fn. 22.

[20] *Federalist* no. 78 (written by Alexander Hamilton) in Alexander Hamilton, John Jay, James Madison, *The Federalist,* ed. by G. W. Carey and J. McClellan (Indianapolis: Liberty Fund, 2001).

[21] S. Hampshire, *Innocence and Experience* (London: Penguin, 1989): 53.

[22] Ibid.: 61.

[23] S. Hampshire, *Justice is Conflict* (London: Duckworth, 1999): 18.

[24] Ibid.: 89.

[25] See M. Oakeshott, "On Being Conservative" and "Political Education" in *Rationalism in Politics and Other Essays* (2nd expanded edition Indianapolis: Liberty Fund, 1991).